BRIEF IN SUPPORT OF PETITION.

Opinion of the Circuit Court of Appeals for the First Circuit.

The opinion of the Circuit Court of Appeals is printed in the Record, pp. 235-245, and is incorporated herein by reference.

Jurisdiction.

The jurisdiction of this Court is set forth in the petition.

Statement of the Case.

The case has been stated in the petition and is set forth in the opinion of the Circuit Court of Appeals, which appears in the Record and is incorporated herein by reference.

Specification of Errors.

A specification of errors is set forth in the petition and is incorporated herein by reference.

Points to be Discussed.

The points to be discussed are as follows:

I. The plaintiff appellee should have been estopped from recovery for overtime, and thus the Circuit Court of Appeals erred in sustaining the District Court's refusal to grant a directed verdict for the defendant appellant and in sustaining the District Court's refusal to charge the

jury as requested in the defendant appellant's requests for rulings numbered 13 and 14.*

II. The plaintiff appellee was a *bona fide* executive or administrative official as defined by the Act and the regulations issued by the Administrator under the authority granted him in the Act.

III. If the Act itself must be applied literally according to its words, the regulations interpreting the Act must likewise be applied literally according to their grammatical construction, and the Circuit Court of Appeals erred in applying the Act literally and not applying the regulations literally according to their grammatical construction.

IV. The verdict of the jury was in such a form that no monetary damages could be legally awarded the plaintiff, and therefore judgment should not have been entered for the plaintiff in the sum of $6866.11 and the Circuit Court of Appeals erred in sustaining the lower court's dismissal of the defendant's motion for a new trial by failing to pass upon it in its opinion.

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*"13. If the jury finds that it was the plaintiff's duty as office manager or treasurer to keep or supervise the keeping of records of the defendant's employees' wages, hours and overtime and if the jury finds that the plaintiff did not keep a record of his alleged overtime other than his own personal record kept by himself or his wife, he should be estopped from now claiming unpaid wages for such alleged overtime under Sections 6 and 7 of the Fair Labor Standards Act of 1938.

"*Mortenson* v. *The Western Electric Light & Tel. Co.*, 42 Fed. Supp. 319 (November 10, 1941).

"14. If the jury finds that it was a part of the plaintiff's duties to keep a record or supervise the keeping of a record of the wages, hours and overtime of the defendant's employees, but that the plaintiff did not enter on such records his own hours and overtime, then such failure to record his hours and overtime was a breach of Section 11 (c) of the Fair Labor Standards Act of 1938 and the plaintiff cannot benefit from his own wrong.

"*Mortenson* v. *The Western Electric Light & Tel. Co.*, 42 Fed. Supp. 319 (November 10, 1941)."

Argument.

I. The plaintiff appellee should be estopped from recovering overtime compensation.

A. The plaintiff was an employer himself within the meaning of the Act and thus is estopped and should not recover for his own violation of the law which gave rise to his claim. Section 3 (d) of the Act defines an employer as follows:

> "Employer includes any person acting directly or indirectly in the interests of an employer in relation to an employee."

The plaintiff on his own evidence acted directly in the interests of the defendant in relation to other employees, in that it was his duty to keep, and he did so keep (R. pp. 88-90), the record of the regular pay and overtime pay of all the defendant's office staff, except that of his own (R. pp. 183, X-Q. 1421), of which group he claimed to be a member, and by virtue of which membership he claims overtime compensation. Furthermore, the plaintiff was a director and treasurer of the defendant corporation (R. p. 61, Qs. 96, 97, 98), was familiar with the Wages and Hours Act (R. p. 115, X-Q. 749), knew the defendant was obliged to keep adequate records of employees' overtime (R. p. 116, X-Q. 752), and knew there was a penalty for failure to do so (X-Q. 753). The plaintiff's testimony thus brings him within the definition of an employer, and since he himself as an employer was guilty of a violation of the Act in failing to keep a record of and pay himself overtime if it was due him, he should be estopped from recovery.

It has been held that, where a statute defines the meaning of words used therein, the statutory definition must prevail, regardless of what other meanings may be attributable to it by other authorities or even by common understanding.

Fox v. *Standard Oil Co.*, 294 U.S. 87.

Section 16 (b) of the Act states that any employer who violates the provisions of sections 6 and 7 (the minimum wages and maximum hours sections, which contain the overtime pay provisions) shall be liable to the employee or employees affected in the amount of their unpaid minimum wages or their unpaid overtime compensation, as the case may be, and an additional equal amount as liquidated damages. Since the plaintiff by virtue of the Act is an employer, he is equally liable for violation of the Act as is the defendant, his employer. Thus to allow the plaintiff to recover is in effect allowing a joint wrongdoer to recover from one *in pari delicto.*

B. The plaintiff is estopped from recovery by his own acts, failure to act, negligence, or neglect of duty.

1. The jury by its verdict has excluded any question of wilful intent on the part of the plaintiff to defraud the defendant. This discussion must be limited, therefore, to the plaintiff's negligence and dereliction in duty.

The plaintiff's claim for overtime covers a period of slightly more than three years, from October 24, 1938, to October 27, 1941. During the first two months of this period he was office manager and accountant of the defendant by his own designation (R. p. 92, X-Q. 476). The balance of the period, or for two years and ten months, he was duly elected treasurer and director of the defendant (R. p. 61, Qs. 96, 97, 98). As previously stated, during the entire three-year period it was his duty to keep accurate books of account, among which were the records of the office employees' time and overtime (R. p. 90, X-Q. 451, p. 108, X-Q. 675). His case is based upon his allegation and testimony that he was an office employee (R. p. 83, X-Q. 348). He did keep such records and he did pay the other office employees their regular and overtime pay, but

he never kept a record of his own overtime (R. p. 183, X-Q. 1421), nor did he pay himself therefor. No one else had charge of these records. The record shows that a substantial amount of the alleged overtime was done at the plaintiff's home (R. p. 241). He never made a claim for overtime until he left the defendant's employment (R. p. 98, X-Qs. 559, 561, 562). He was familiar with the terms of the Act and knew its requirements and penalties (R. pp. 115, 116, X-Qs. 749, 752, 753). He testified that he was in doubt as to his status under the Act, but never brought that doubt to the attention of the other officers or directors of the company (R. p. 182, Q. 1416, X-Qs. 1419, 1420, and R. p. 241), nor did he bring to the attention of the other officers or directors of the defendant his conference with a government agent in September of 1941, wherein the agent told him he was entitled to overtime (R. pp. 208, 209).

It is submitted that on this evidence, which came wholly from the plaintiff himself, he was estopped by his negligence or dereliction of duty to the defendant (Opinion of Circuit Court of Appeals, R. pp. 241-242).

2. Ordinarily, an intent to deceive is required for estoppel. However, there may be substituted for that intent, neglect. It is not essential that there should be an intentional wrong, but a neglect of duty owing to the person claiming the estoppel will suffice. Negligent ignorance can give rise to estoppel.

> See 21 Corpus Juris, p. 1169, and cases cited.
> See *O'Heron* v. *Grey,* 168 Mass. 573, 577.

This suit itself is sufficient evidence of harm and change of position on the part of the defendant, nor can the fact that the defendant relied upon the plaintiff be seriously disputed, for he was treasurer, director, and sole official responsible for keeping proper time reports and paying

the employees all time and overtime due them. Likewise there was a damaging change of position by the defendant, since double liquidated damages are mandatory under the Act.

Rigopoulos v. *Kervan,* 47 Fed. Supp. 576.
Anuchick v. *Trans-American Freight Lines,* 46 Fed. Supp. 861.

3. Estoppel has been successfully used as a defense to suits for overtime under the Act.

Mortenson v. *Western Light & Telegraph Co.,* 42 Fed. Supp. 319.
Munkens v. *1412 Broadway, Inc.,* 50 Fed. Supp. 632.
Charles W. Gale v. *Fruehauf Trailer Co.,* Kansas Supreme Court No. 35,963 (Jan. 22, 1944).

Estoppel is an equitable defense, and its use and application are peculiar to the facts of each different case.

Munkens v. *1412 Broadway, Inc., supra.*

It is, therefore, submitted that on the peculiar facts of this case, whereby the defendant finds itself at the mercy of the plaintiff in that the defendant, being an inanimate person, had to rely upon the plaintiff as its treasurer for proper records of overtime, the equitable defense of estoppel should have been leniently and liberally interpreted by the Circuit Court of Appeals to give a fair and just result so as to give effect to the true intent of the Act and prevent the Act from producing legislative or judicial brigandage.

Williams v. *Jackson Terminal Co.,* 35 Fed. Supp. 267; 118 Fed. (2d) 324; 315 U.S. 386.

4. The plaintiff's delay in asserting his claim is an element to be considered in estoppel.

Brown v. *Carter Drilling Co.*, 48 Fed. Supp. 489.
See *Wilkinson* v. *Noland*, 40 Fed. Supp. 1009.

5. The plaintiff should not benefit by his own failure to keep proper records any more than an employer may benefit by such failure.

Cf. *Ling* v. *Currier Lumber Co.*, 50 Fed. Supp. 204, 209.

II. The plaintiff appellee was a *bona fide* executive official as defined by the Act and the regulations issued thereunder by the Administrator.

A. The plaintiff was an executive employee at least from October 24, 1940, until his resignation. The requirements for an executive are set forth in Regulations 541.1 (see Appendix, p. 26). For the purpose of this argument the petitioner will assume that the plaintiff did not satisfy the sixth requirement (Regulations 541.1 (F)) from October 24, 1938, to October 24, 1940, because of the jury's findings. It is admitted and so assumed by the Circuit Court of Appeals that he did satisfy the first five requirements (R. p. 242).

Your petitioner, however, contends that from October 24, 1940, which was the date of the new regulations, until the plaintiff's resignation, he not only satisfied the first five requirements, but on the evidence, and the jury might have so found if they had been instructed in accordance with the petitioner's request for instructions No. 20,* he satisfied the sixth, or 541.1 (F).

*"20. The jury should be instructed that the plaintiff's hours of work of the same nature as that performed by non-exempt employees

Section 541.1 (F) reads as follows:

> "(F) whose hours of work of the same nature as that performed by nonexempt employees do not exceed 20 percent of the number of hours worked in the work-week by the nonexempt employees under his direction; provided that this subsection (F) shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment."

Your petitioner contends that this regulation means that an employee, to qualify as an executive, cannot perform work of the same nature as that performed by non-exempt employees under his direction for more than twenty per cent of the number of hours worked in the work week by all of the non-exempt employees under the direction of the employee whose status is being determined. In other words, the basis for estimating the twenty per cent is the total number of hours worked by all of the employees under the direction of the one whose status is under consideration. The lower court refused to instruct the jury as requested on this point. The Circuit Court of Appeals upheld the lower court and decided that although the above regulation, construed grammatically, meant what your petitioner says it does, nevertheless it should not be so construed and must be held to mean that the employee shall not work more than twenty per cent of his own time doing the same kind of work as non-exempt employees under his direction. The Circuit Court of Appeals decided that the Administrator could not have meant what he said.

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must exceed twenty per cent of the total number of hours of all the non-exempt employees under his direction in order to exclude the plaintiff from the executive class of corporate employee as defined in Regulations, Part 541, Section VI, entitled 'Executive Employees' recommended definition Section 541.1, Paragraph (f)."

The problem involved is not actually one of construction or interpretation, although the Circuit Court of Appeals has so considered it to be. Your petitioner submits that the construction or interpretation of a statute (or regulation) implies an ambiguity in the language used therein. Here the language used is grammatically clear and unambiguous, and the Circuit Court of Appeals in its opinion on page 243 of the Record so states, as follows:

> "We must admit that grammatically construed the Regulation means what the defendant says that it does."

It is a cardinal rule of law that, where the language of a statute is clear, it must be complied with, even though the statute contains a provision for liberal construction. Where the language of a statute is plain and unambiguous, there is no occasion for construction (59 Corpus Juris, 953 *et seq.*, and cases cited; *United States* v. *Missouri-Pacific Railroad*, 278 U.S. 269). Even though other meanings could be found, the court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislature (or of the Administrator, to whom the legislature has delegated its power). The statute (or regulation) must be given effect according to its plain and obvious meaning and cannot be extended beyond it because of some supposed policy of the law or because the legislature did not use proper words to express its meaning, or the court would be assuming legislative authority (see above reference to 59 Corpus Juris, 953 *et seq.*). Where the language is clear and unambiguous, but at the same time incapable of reasonable meaning, the court cannot construe the statute to give it a meaning. The court cannot attribute to the legislature an intent which is not in any way expressed in the statute (see 59 Corpus Juris, 958,

and cases cited, and *Northern Pacific Railroad* v. *Concannon*, 239 U.S. 382).

The regulation in question is issued by the Administrator through the power granted him by the Act itself (section 13 (a) (1) of the Act). It thus has the same force and effect as the statute itself. It must, therefore, be subject to the same rules of construction as the statute, and the law quoted above applies with equal force to regulations. Thus the Circuit Court of Appeals erred in attempting to give the regulation a meaning different from what it clearly says. Your petitioner submits that this departure from the rules of statutory construction is sufficient evidence for granting the writ of certiorari.

III. If the Act itself must be applied literally according to its words, the regulations interpreting the Act must likewise be applied literally according to their grammatical meaning, and the Circuit Court of Appeals erred in applying the Act literally and not applying the regulations literally.

These two points have been fully argued in the preceding section of the brief. They are submitted here for the purpose of pointing out the inconsistency of the opinion of the Circuit Court of Appeals. In its opinion (R. p. 242) the Circuit Court of Appeals states that "the statute must be applied literally according to its words and recovery allowed for the full amount permitted by the Act." Further on (R. p. 243) the Circuit Court of Appeals says: "Grammatically construed the Regulation means what the defendant says that it does. . . . In view of the arbitrary result which would follow from interpreting the Regulation as the defendant would have us, we do not think that the Administrator could have meant exactly what he said." These two quotations speak for themselves. On the one hand the statute must be taken to mean what the words

say, and on the other hand the regulations issued under authority of the statute do not mean what they say. In view of your petitioner's contention that the regulations have the same force and effect as the Act itself, which in section 13 (a) (1) gives the Administrator power to define and delimit the terms "executive" and "administrative" employees, it would seem that the use by the Circuit Court of Appeals of two different rules of construction for the same purpose is unfair and inequitable and should be reviewed by this Court.

IV. The verdict of the jury was in such a form that no monetary damage could be legally awarded the plaintiff, and therefore judgment should not have been entered for the plaintiff in the sum of $6866.11 and the Circuit Court of Appeals erred in sustaining the lower court's dismissal of the defendant's motion for a new trial by failing to pass on this point in its opinion.

It has been held that damages for overtime under the Act must be awarded on a weekly basis.

> *Overnight Transportation Co.* v. *Missel*, 316 U.S. 572.

The jury's verdict was that the plaintiff worked 225 hours overtime the first year, 185 hours overtime the second year, and 500 hours overtime the third year. The plaintiff's evidence was that on February 1, 1941, his salary was raised from $325 a month to $425 a month (R. p. 62, Q. 108). The jury found, as we have stated above, that the plaintiff worked 500 hours overtime from October 24, 1940, to October 27, 1941. From this finding it is impossible to determine what part of the 500 hours the plaintiff worked between October 24, 1940, and February 1, 1941, at $325 a month, and how many hours he worked at $425 a month

from February 1, 1941, to the end of his employment. Thus the entry of the judgment by the lower court in the sum of $6866.11 was based upon pure conjecture so far as the last year's overtime pay is concerned. The failure of the Circuit Court of Appeals to rule on this point should be reviewed by this Court.

Conclusion.

Wherefore your petitioner respectfully submits that the petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit should be issued for the foregoing reasons.

Respectfully submitted,

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